bank with the answer "no account". The court awarded the customer nominal damages for breach of contract and substantial damages for libel. Therefore in my opinion the words "Account Closed" written on a cheque contrary to the truth would similarly be libellous. As I have indicated, no blame can be attached to the Bank for printing the words "Account Closed" on the cheque No. 488534. As regards the cheque No. 488535, in my judgment it was libellous for the Bank to print the words "Account Closed" on it at the time when the Bank had the duty to honour it.

Where a customer brings an action against his bank for wrongfully refusing to pay a cheque which he has drawn, the amount of the damages for breach of contract depends on whether or not the customer is a trader. In an action for breach of contract for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial but reasonable damages for injury to his commercial credit, without the necessity of alleging and proving any actual damage. Irrespective of whether the plaintiff is a trader or not, the following is the rule for assessment of damages for libel as stated by Shorland J. in *Baker* v. *Australia and New Zealand Bank*[2]:–

> The matters to be taken into consideration in assessing damages are the position and standing of the plaintiff, the nature of the libel, the mode and extent of the publication, the absence of any retraction or apology, and the whole conduct of the defendant from the time when the libel was published, down to the very moment of verdict.

The Plaintiff in the present case is the general manager of Syarikat Hock Guan and assistant managing director of Ng Chee Kuan & Sons Hardware Sdn. Bhd. He is also a director of Waja Steel Sdn. Bhd., Amalgamated Industrial Steel Sdn. Bhd. and managing director of Hock Hup Development Sdn. Bhd. He is also manager of three other companies. He admitted that the Bank's manager apologised to him when he went to see the manager after he came to know that the cheque No. 488534 had been dishonoured. Taking all the circumstances into consideration I assess damages at $500 against the Bank for breach of contract in wrongfully refusing to honour the cheque No. 488535, and $500 for libel in printing the words "Account closed" on that cheque and publishing them.

I allow the appeal and order that the damages be awarded to the Plaintiff together with the costs here and in the court below.

Appeal allowed.

Solicitors: *Che Mokhtar Mian Lee & Low, Shearn Delamore & Co.*

PACIFIC CENTRE SDN. BHD. v. UNITED ENGINEERS (MALAYSIA) BHD.

[O.C.J. (Edgar Joseph Jr. J.) November 16, December 7 & 8, 1983; January 13, 1984]
[Penang – Civil Suit No. 427 of 1980]

Practice & Procedure – Mareva injunction – Application for – Principles applicable – Mareva injunction application distinguished from application under Debtors Act, 1957, s.19.

Practice & Procedure – Mareva injunction – Jurisdiction of Malaysian courts to grant Mareva injunction – R.H.C. 1980, 0.92 r.4 – Courts of Judicature Act 1964, s. 70.

Jurisdiction – Mareva injunction – Inherent power of Court to grant Mareva injunction – R.H.C. 1980, 0.92 r.4 – Courts of Judicature Act 1964, s. 70.

In this case, an application for *Mareva* injunction was made *inter partes*. This was because it was a sequel to a successful application by the defendants to discharge an *ex-parte* order made earlier by the court under section 19 of the Debtors Act 1957.

The targets of the said application were two parcels of land belonging to the defendants, or the proceeds of sale thereof, insofar as the same did not exceed M$16,823,443/- until the hearing of the action or until further order. The two properties were "the Sungei Besi property" and "the Petaling Jaya property".

The parties conceded that the essential elements requiring proof by the plaintiffs were:

(a) a good arguable case,

(b) assets of the defendants were within jurisdiction, and

(c) a real risk that the defendants will or may remove their assets from jurisdiction or dispose of them within the jurisdiction so as to render them unavailable or untraceable.

The only issue in this case was with regard to the third element.

Held: (1) no inference that this was not a genuine *Mareva* case could arise simply because the application was made *inter partes*. Indeed, *ex parte* interim or interlocutory injunctions should only be applied for where it is genuinely impossible to give notice without defeating the purpose of the order;

(2) the Rules of the High Court have statutory force and are not merely rules of practice. In the result, there is jurisdiction by virtue of inherent powers to grant *Mareva* injunctions in Malaysia;

(3) the onus was on the plaintiffs to establish a *prima facie* case for the grant of a *Mareva* injunction and if the court was so satisfied it had to consider the evidence adduced by the defendants to see if this *prima facie* case had been neutralized or displaced;

(4) because in many cases, there will be a practical difficulty of proving the requisite intent, it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant;

(5) the mere disposal of funds (in this case proposed to be raised by the sale of the Sungei Besi property) incidental to the defendants' course of business, for example, by the repayment of debts, does not come within the scope of dissipation of assets with the intention or with the effect of defeating the plaintiffs' claim;

(6) the court would not make a *Mareva* Order in terms of the primary relief sought, so that the defendants were at liberty to proceed with the sale of the Sungei Besi property but, on the usual undertaking as to damages by the plaintiffs, reinforced by a further undertaking of a like nature by the plaintiffs' parent company, the defendants should be restrained pending trial of the action by itself, its servants or agents, from disposing of or dealing with any part of the net proceeds of sale of the Sungei Besi property insofar as the same did not exceed $16,823,443 otherwise than by or pursuant to an Order of Court;

(7) these proceeds would not necessarily remain sterilized for the benefit of the plaintiffs for the court could permit the defendants to use them for paying *bona fide* debts as they fall due and upon sufficient proof of an intention to do so;

(8) it would be open to any creditor of the defendants, and indeed to the defendants themselves, to apply for a variation of the said Order if they so wished.

Obiter dictum: "... legislation should be introduced along the lines of s.37(3) of the U.K. Supreme Court Act, 1981, so that *Mareva* jurisdiction could be placed on a statutory basis in this country."

Cases referred to:

(1) *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] Q.B. 645; [1979] 2 All E.R. 972.
(2) *Mediterranea Raffineria Siciliana Petroli S.p.a.* v. *Mabanaft GmbH (unreported)* (1978) noted by Charity, "Mareva Injunctions: A Lesson in Judicial Acrobatics" (1981) 12 Journal of Maritime Law & Commerce 349, 356.
(3) *Allen* v. *Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252, 1254, 1255.
(4) *Chartered Bank* v. *Daklouche* [1980] 1 W.L.R. 107.
(5) *Z. Ltd.* v. *A.* [1982] 1 All E.R. 556; [1982] 2 W.L.R. 288, 307.
(6) *Rasu Maritima* v. *Pertambangan* [1977] 3 All E.R. 324, 334; [1978] 1 Q.B. 644.
(7) *Kepong Prospecting Co. Ltd.* v. *Schmidt* [1962] M.L.J. 375.
(8) *Launch, Research & Dev. Inc.* v. *Essex Distributing Co.* [1977] 4 C.P.C. 361, Ont. H.C.
(9) *Zainal Abidin bin Haji Abdul Rahman* v. *Century Hotel Sdn. Bhd.* [1982] 1 M.L.J. 260, 264.
(10) *Ibid* [1982] 1 M.L.J. 40.
(11) *McKay (Riley) Pty. Ltd.* v. *McKay* [1982] 1 N.S.W.L.R. 264.
(12) *Iraqi Ministry of Defence & Ors.* v. *Arcepey Shipping Co. S.A. (Gillespie Bros. & Co. Ltd.* Intervening) *The Angel Bell* [1980] 1 All E.R. 480, 487; [1981] 1 Q.B. 65; [1979] 2 Lloyd's Rep. 491.
(13) *Ibid*, 486.
(14) *Ibid*, 484.
(15) *Turner* v. *Sylvester* [1981] 2 N.S.W.L.R. 295.
(16) *Bekhor & Co. Ltd* v. *Bilton* [1981] 2 All E.R. 565.
(17) *Siskina* v. *Distos Compania Naviera S.A.* [1979] A.C. 210, 261.
(18) *Ibid*, 253.
(19) *Ninemia Maritime Cpn.* v. *Trave Schiffahrtsgesselshaft mbH Und Co. Kg. (Unreported)* Times, May 21, 1983; [1983] Com L.R. 234.
(20) *Montecchi* v. *Shimco* [1979] 1 W.L.R. 1180, 1183 – 1184; [1980] 1 Lloyd's Rep. 50.
(21) *Mareva Cia. Nav.* v. *International Bulkcarriers* [1975] 2 Lloyd's Rep. 509, 510; [1979] 119 Sol. J. 660.
(22) *Ets. Esefka* v. *Central Bank of Nigeria* [1979] 1 Lloyd's Rep. 445.
(23) *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190, 195; [1980] 1 W.L.R. 1259.
(24) *Abdul Rahman* v. *Abu Taha* [1980] 3 All E.R. 409; [1980] 1 W.L.R. 1268.
(25) *A & Anor.* v. *C. & Others (No. 2)* [1981] 1 Q.B. 961, 963; [1981] 2 All E.R., 126, 127.
(26) *Faith Panton Prop. Plan* v. *Hodgetts & Anor.* [1981] 2 All E.R. 877, 882.
(27) *Art Trend Ltd.* v. *Blue Dolphin (Pte) Ltd. & Ors.* [1983] 1 M.L.J. 25, 30.
(28) *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.* [1978] 1 W.L.R. 966; [1978] 3 All E.R. 164.
(29) *Yeng Hing Enterprise* v. *Liow Su Fah* [1979] 2 M.L.J. 240, 244.
(30) *J.D. Barry Pty. Ltd.* v. *M & E Constructions Pty.* [1978] V.R. 185, 188.
(31) *Re Young (J.L.) Manufacturing Co.* [1900] 2 Ch. 753.
(32) *Wiley, Lowe & Co.* v. *Gould* [1958] O.W.N. 316.
(33) *Penang Garden Sdn. Bhd. & Anor.* v. *United Engineers (M) Berhad (unreported)* Penang Civil Suit No. 288 of 1983.

CIVIL SUIT.

Ghazi Ishak for the applicants/plaintiffs.
C. Abraham for the respondents/defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: It has been said that applications for *Mareva* injunctions are invariably made *ex parte* in the first instance because in a genuine *Mareva* case the defendant *ex hypothesi* is likely to hasten the removal of his assets once he becomes aware of any application preventing him from doing so. "The whole point of the

Mareva jurisdiction," said Mustill, J. in the *Third Chandris Shipping Corporation* v. *Unimarine S.A.*[1] "is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction." In the same way the Court of Appeal in *Mediterranea Raffineria Siciliana Petroli S.p.a.* v. *Mabanaft GmbH*[2] emphasized the need to "see the stable door is locked before the horse is gone." For this reason, in altogether exceptional and in extreme circumstances, a Judge can entertain a telephonic request by counsel for a *Mareva* injunction and, if the matter is satisfactorily explained, make an order accordingly: see, for example, *Allen* v. *Jambo Holdings, Ltd.*[3]. In this case, however, the application was made *inter partes* because it was a sequel to a successful application by the Defendants to discharge an *ex parte* order which I had earlier made under s.19 of the Debtors Act, 1957. In making the order for discharge I merely announced my decision without giving any reasons but I should now wish to make it clear that I did so because I was satisfied on the additional material and the arguments at the *inter partes* hearing that there was insufficient evidence from which I could draw the inference of an intent to obstruct or delay on the part of the Defendants within the meaning of s.19 of the Debtors Act. I did however add a rider that it was open to the Plaintiffs, should they so wish, to apply for a *Mareva* injunction, in which case it would be determined on its merits and after hearing submissions by counsel on both sides.

In my view, however, the mere fact that an *ex parte* order under s.19 has been discharged upon application by the defendant does not *ipso facto* mean that an application for a *Mareva* injunction by the same plaintiff on the same grounds is bound to fail because, amongst other considerations, the points requiring proof for a Mareva injunction are less demanding than those required for a s.19 order as I shall presently demonstrate and, in doing so, I propose also to deal generally with some of the more important differences between these two remedies.

In the first place, s.19 applications have to comply with strict statutory requirements laid down therein whereas, *Mareva* jurisdiction rests with the Courts' general discretion and is not circumscribed by statutory requirements.

In the second place, a writ must be issued before an application supported by evidence on oath can be made under s.19 whereas, in urgent cases, *Mareva* jurisdiction can be invoked before issue of the writ and, if the situation demands it, on the strength of a draft affidavit with an undertaking to affirm one later: *Chartered Bank* v. *Daklouche*[4]; *Allen* v. *Jambo Holdings, Ltd.*[3] and *Z. Ltd.* v. *A.*[5] It follows, that *Mareva* Orders can be obtained more speedily than s.19 orders.

In the third place, the plaintiff in a s.19 application must satisfy the Court that he has a good cause of action, whereas, in *Mareva* applications, all he need do is to show that he has a good arguable case, *Rasu Maritima* v. *Pertambangan*[6]. It follows, that the standard of proof required for *Mareva* orders is lower than that required for s.19 orders.

In the fourth place, in s.19 applications, in addition to showing that he has a good cause of action, the applicant would be entitled to an Order in his favour if he can also satisfy the Court that the defendant is absent from the Federation and his place of aboard cannot be discovered or service of the writ of summons cannot, without a great deal of delay or difficulty, be effected. Proof of an intent on the part of the defendant to obstruct or delay the execution of any judgment is not therefore a *sine qua non*. Whereas, in *Mareva* applications, the plaintiff must adduce sufficient evidence to raise an inference that there is a real risk, or at least a risk, that the defendant will dissipate his assets with the object, or with the effect, of putting them out of the plaintiff's reach. I shall have more to say about this anon.

In the fifth place, in s.19 applications, where the plaintiff is relying on sub-section (1)(c) of that section, he must satisfy the Court by evidence on oath, of an intent on the part of the defendant, to obstruct or delay the execution of any judgment, though this can be established as a matter of inference: *Kepong Prospecting Co. Ltd.* v. *Schmidt.*[7] Whereas, a *Mareva* applicant need only show that there is a real risk, or at least a risk, that the defendant will dissipate his assets with the object, or with the effect, of putting them out of the plaintiff's reach, thus stultifying any judgment he may recover. The Court will not go into the likelihood of prejudice in the shape of dissipation of assets; the risk of it is enough.

In the sixth place, a s.19 Order operates as a form of pre-trial attachment and indeed the heading of Part V of the *Debtors Act, 1957*, under

which s.19 falls, is entitled "Attachment of Property before Judgment." 0.47 r.6(1), 0.74 r.5(1), r.6(2) Form 197 paragraph (b) of *The Rules of the High Court* and s.334 of the *National Land Code*, all confirm this view. A s.19 Order therefore operates as a right *in rem* against its subject-matter. A *Mareva* order, on the other hand, operates *in personam* against the defendant, restraining him from dealing with or disposing of or dissipating assets affected by it, though there is a conflict of judicial opinion on this point in the U.K.: see, for example, Denning, M.R., in *Z. Ltd.* v. *A.*[5]

In the seventh place, there is no requirement for the usual undertaking as to damages from a s.19 applicant, whereas this is a *sine qua non* in the case of a *Mareva* applicant.

In any event, in considering the application for discharge of the *ex parte* order under s.19, I was only concerned with whether *at the time the ex parte order* was made there was sufficient material to justify its making. I would add that the material and the submissions then before me, were nowhere near as substantial as those now before me.

In the circumstances, no inference that this is not a genuine *Mareva* case can arise simply because the application was made *inter partes*. Indeed, *ex parte* interim or interlocutory injunctions should only be applied for where it is genuinely impossible to give notice without defeating the purpose of the order: *Launch, Research & Dev. Inc.* v. *Essex Distributing Co.*[8]

I must now turn to the application before me, the targets of which are two parcels of land belonging to the Defendants, or the proceeds of sale thereof, insofar as the same do not exceed the sum of M$16,823,443/- until the hearing of the action herein or until further order. The two parcels of land in question were Lot 262, section 92, comprised in C.T. 24128, Bandar Kuala Lumpur, District of Kuala Lumpur, Wilayah Persekutuan, with an estimated area of 7 acres 0 road 10 poles ("the Sungei Besi property"), and Lot 61, section 20, comprised in State Lease 3132, Bandar Petaling Jaya, District of Kuala Lumpur, Selangor, with an estimated area of 3 acres 3 roods 38 poles ("the Petaling Jaya property").

Before I deal with the merits of this application it is, I think, appropriate at this stage, to answer the three challenges to the jurisdiction of this Court to grant *Mareva* relief raised by Encik Abraham for the Defendants.

First, he said he would so far as may be necessary, reserve for the consideration of the Federal Court the point as to whether or not its decision in *Zainal Abidin bin Haji Abdul Rahman* v. *Century Hotel Sdn. Bhd.*[9] which is authority for the proposition that jurisdiction for the grant of a *Mareva* injunction in this country is derived from paragraph 6 of the Schedule to the *Courts of Judicature Act, 1964*, equivalent to s.45 of the *U.K. Supreme Court of Judicature (Consolidation) Act, 1925*, is correct.

Secondly, he submitted that the judgment of Raja Azlan Shah C.J. (Malaya) (as he then was) in *Zainal Abidin's case (supra)* should be given a narrow interpretation so that only property the subject of a suit can be injuncted.

Thirdly, the form of the Order sought in this case was based not on s.45 of the *U.K. Supreme Court of Judicature (Consolidation) Act, 1925*, but on s.37(3) of the *U.K. Supreme Court, 1981*. He pointed out that in *Zainal Abidin's case (supra)*, Raja Azlan Shah C.J. (Malaya) concluded by saying that paragraph 6 of the Schedule to the *Courts of Judicature Act, 1964*, was equivalent not to s.37(3) of the *Supreme Court Act, 1981, but to* s.45 of the *Supreme Court of Judicature (Consolidation) Act, 1925*. He accordingly submitted that I have no jurisdiction to make the Order prayed for.

As *Zainal Abidin's case (supra)* is an authority binding on me, I do not propose to, and indeed cannot, deal with point(1).

Turning to point (2), the facts in *Zainal Abidin's case (supra)* were that the defendant who owned the hotel had executed a lease of the third floor for three years in favour of the plaintiff for use by him as a recreational centre and one of the amenities of the hotel. Due to financial difficulties, eight months after the grant of the lease, the defendant gave notice to the plaintiff that they intended to close down the hotel as a result of which plaintiff issued a writ for wrongful repudiation of the agreement. The defendant had mortgaged and charged the hotel to their parent company and planned to sell it. The plaintiff apprehended that if the sale were to go through the proceeds would be appropriated by the defendant's parent company and there would be nothing left should he successfully recover judgment against the defendant. In the circumstances, he sought an injunction

to restrain the proposed sale. Hashim Yeop A. Sani J. (as he then was) who heard the application at first instance refused the injunction on the ground that the relief sought was unknown to our law.[10] From this decision the plaintiff appealed and the Federal Court held that it had jurisdiction to grant such an injunction by virtue of paragraph 6 of the Schedule to the *Courts of Judicature Act, 1964,* which it considered was generally *in pari materia* with s.45 of the *U.K. Supreme Court of Judicature (Consolidation) Act, 1925,* but refused to do so because, on the evidence, the plaintiff's fears were groundless. It is clear, in my opinion, that the fund to which the injunction, if granted, would have attached was not the subject-matter of the dispute. Accordingly, I find that the interpretation put forward by Encik Abraham on *Zainal Abidin's case (supra)* is quite untenable and I have no hesitation in rejecting it.

As regards point (3), which I consider to be extremely technical and devoid of merit, it must not be forgotten that if I have power to grant a *Mareva* injunction, and that question has been an swered in the affirmative in *Zainal Abidin's case (supra),* then, bearing in mind that the jurisdiction to do so is equitable, I can find nothing objectionable in the form which the application now takes.

This is sufficient to dispose of Encik Abraham's challenges to jurisdiction.

I consider, however, that I should go further and deal with the question I raised with counsel during the course of the argument, namely, whether independently of paragraph 6 of the Schedule to the *Courts of Judicature Act, 1964,* the Court has jurisdiction to grant *Mareva* injunctions by virtue of its inherent powers confirmed in Order 92 rule 4 of the *Rules of the High Court, 1980,* which provides:

"For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."

Encik Abraham referred to the case of *McKay (Riley) Pty. Ltd* v. *McKay*[11] and submitted that the *Mareva* injunction must be a creature of statute and as 0.92 r.4 of the *Rules of the High Court, 1980,* is merely a rule of practice it surely could not be a basis for *Mareva* jurisdiction.

It seems clear that the *Mareva* injunction is aimed at the "prevention of abuse" *(Iraqi Ministry of Defence & Ors.* v. *Arcepey Shipping Co. S.A. (Gillespie Bros. & Co. Ltd. Intervening) The Angel Bell)*[12] and "injustice"[13] which would result from defendants "making themselves judgment-proof by removing their assets from the jurisdiction to shareholders or others who might be amicably disposed, and doing so before judgment and execution,"[14] rather than protection of the plaintiff's interests. It is also clear that the inherent jurisdiction of the Court includes all the powers that are necessary "to fulfil itself as a Court of Law"; "to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner": Jacob, The Inherent Jurisdiction of the Court – [1970] 23 Current Legal Problems, 23, 27 and 28.

In *Turner* v. *Sylvester*[15] Rogers, J. thought that there was justification for recourse to the inherent jurisdiction for the granting of *Mareva* injunctions. This is what his Lordship said:

"As I understand his Lordship's approach he takes the view that any superior court has an inherent power to prevent abuse. The abuse for present purposes is the utilization of the court's procedures for defending claims and giving a hearing and the defendant utilizing the time required for such procedures to remove by stealth assets within the jurisdiction. In other words, it presupposes a plaintiff who has a wholly justified claim against the defendant. But for the need to go through court procedures, he would be entitled to repayment forthwith. The defendant puts the plaintiff to proof of the ingredients of his cause of action by filing a defence and otherwise invoking the procedures laid down for trials of action. During the time it takes a plaintiff to obtain judgment, the defendant utilizes the time to remove all his assets from the jurisdiction. In this sense, it is said the defendant is abusing the court's process."

In *McKay (Riley) Pty. Ltd.* v. *McKay & Anor.*[11] the Court of Appeal of New South Wales supported the above analysis.

English Judges, with the exception of Lord Justice Stephenson, following the traditionalist line, have neatly avoided the question whether inherent jurisdiction can be invoked for purposes of granting *Mareva* injunctions. In *Bekhor & Co., Ltd.* v. *Bilton*[16] it was argued that jurisdiction to order discovery in aid of *Mareva* flows from an "inherent or residual jurisdiction" or "... general residual discretion to make any order necessary to ensure that justice be done between the parties." The Court of Appeal however opted to find jurisdiction in powers incidental to the statutory injunctive power.

I might add, in passing, that I do not consider that there is any substance in the submission that 0.92 r.(4) of the *Rules of the High Court* is purely a rule of practice. *The Rules of the High Court* were enacted in exercise of the powers conferred by s.70 of the *Courts of Judicature Act, 1964,* with the consent of the Chief Justices of Malaya and Borneo and the Rules Committee and are comprised in P.U.(A) 50 which is clearly subsidiary legislation within the meaning of section 3 of the *Interpretation Act, 1967.* The Rules in my opinion, therefore, have statutory force and are not mere rules of practice. In the result, I hold that there is jurisdiction by virtue of inherent powers to grant *Mareva* injunctions in this country.

This is sufficient to conclude the arguments as to jurisdiction but before proceeding further I venture to suggest that legislation should be introduced along the lines of s.37(3) of the *U.K. Supreme Court Act, 1981,* so that *Mareva* jurisdiction could be place on a statutory basis in this country.

I must now turn to the merits.

Encik Ghazi, for the Plaintiffs, pointed out that the following essential elements required proof by his clients:

(1) a good arguable case,

(2) assets of Defendants within jurisdiction, and

(3) a real risk that the Defendants will or may remove their assets from jurisdiction or dispose of them within the jurisdiction so as to render them unavailable or untraceable.

Encik Abraham, for the Defendants, conceded that the three elements mentioned above were all that the Plaintiffs need prove to entitle themselves to the orders prayed for. He also conceded that the only issue here was with regard to the third element. Nevertheless, in view of the great practical importance of *Mareva* injunctions described as a "creative" (*Siskina v. Distos Compania Naviera S.A.*[17]) "procedural innovation"[18] in the House of Lords and by Lord Denning (in his book, "The Due Process of Law (1980) Butterworths at page 134) as the "present piece of judicial reform" of his time, I propose to touch briefly on the requirements of proof with regard to element (1) as well.

The element that the plaintiff must show a good arguable case finds support in the case of *Rasu Maritima S.A.* v. *Pertambangan*[6]. This has also been expressed differently, namely, that it must appear likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum: *Z Ltd.* v. *A-Z Ltd. & ALL*[5]. In the yet unreported case of *Ninemia Maritime Cpn.* v. *Trave Schiffehrtsgesselshaft mbH Und Co Kg*[19], Mustill, J. expounded what he thought was the meaning to be attributed to the phrase "likely to recover judgment" and, after a careful analysis of the authorities, concluded:

> "In my judgment, he (Lord Justice Kerr) was doing no more than reiterating that the plaintiff must always demonstrate a likelihood of success, and was not prescribing the degree of likelihood. In these circumstances I consider that the right course is to adopt the test of a good arguable case in the sense of a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than fifty-fifty per cent chance of success."

Applying this test, I am satisfied that the Plaintiffs here have a good arguable case and I might add that the Defendants apparently recognise this as they have taken out third party proceedings to obtain contribution and indemnity. An appeal against the order giving leave to issue third party proceedings has been recently dismissed by the Federal Court.

The second element, namely, that the Plaintiffs must have assets within the jurisdiction is, as I have already said, not in issue.

In determining the third element, namely, the dissipation of assets, I have kept in the forefront of may mind, on the one hand, the principle that the *Mareva* doctrine was not intended to rewrite the English law of insolvency: (per Goff, J. in the *Angel Bell*[12] and per Ackner, L.J. in *Bekhor & Co. Ltd.* v. *Bilton*[16],) that to achieve this end the *Mareva* injunction does not prevent a defendant from meeting his legitimate business debts out of the injuncted fund *(The Angel Bell) (supra)* and, on the other hand, that propounded by Lord Denning in the *Third Chandris (supra),* p.668 at p.672, namely, whether or not "there was likely to be any real risk of default on the part of the defendant" and by Lord Justice Bridge in *Montecchi* v. *Shinco*[20], namely, that an injunction would be granted if there was "A real reason to apprehend that if the injunction is not made the intending plaintiff ... may be deprived of a remedy...".

There appears to be a difference of judicial opinion as to whether it is necessary for a plaintiff in a *Mareva* application to establish that the defendant will deal with his assets with the intention and not just with the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to recover against the defendant. The following extracts from various judgments will illustrate this:

In *Mareva Cia Nav* v. *International Bulkcarriers*[21] Lord Denning, M.R. at p.510, said:

"There is jurisdiction to grant an injunction if there is a danger that the debtor may dispose of his assets so as to defeat (the debt) before judgment."

In *Rasu Maritima* v. *Pertamina*[6], Lord Justice Kerr, approved by Lord Denning, M.R., at page 527, said:

"On being appraised of the proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the court. The defendant can then largely ignore the plaintiff's claim in the courts of this country and snap his fingers at any judgment which may be given against him."

In *Ets Esefka* v. *Central Bank of Nigeria*[22], Lord Denning, M.R., at page 448, said:

"(The jurisdiction exists) where there is danger of the money being taken out of the jurisdiction so that if the plaintiffs succeed they are not likely to get their money."

and Lord Justice Brandon, in the same case, at page 449, said:

"(The jurisdiction exists where) the assets of the defendants are likely to be removed from the jurisdiction so as to avoid payment of any judgment which the plaintiffs might obtain."

In *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A.*[12], Goff, J. (as then was) rejected a submission that the purpose of the jurisdiction "is to freeze a foreign defendant's assets in this country to ensure that there is a fund available in this country from which the plaintiff will be able to satisfy a judgment." He added "that the purpose of the jurisdiction was not to rewrite the law of insolvency" ... but simply "to prevent the injustice of a foreign defendant removing his assets from the jurisdiction which might otherwise have been available to satisfy a judgment."

In the *Third Chandris* v. *Unimarine*[1] Lord Justice Lawton, at page 672, said:

"... There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction ... (The judges of the Commercial Court) have special experience of commercial cases and they can be expected to identify likely debt dodgers as well as, probably better than, most businessmen. They should not expect to be given proof of previous defaults or specific incidents of commercial malpractice. Further, they should remember that affidavits asserting belief in, or fear of, likely default have no probative value unless the sources and grounds thereof are set out ... In my judgment an affidavit in support of a *Mareva* injunction should give enough particulars of the plaintiff's case to enable the court to assess its strength and should set out what enquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a Commercial Judge to infer whether there is likely to be any real risk of default ..."

In *Montecchi* v. *Shimco*[20], Lord Justice Bridge, at pp.1183-84, said:

"... the basis of the *Mareva* injunction is that there has to be a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he seeks to sue ..."

In *Barclay-Johnson* v. *Yuill*,[23] Megarry V.-C., at page 195, said:

"(For the jurisdiction to exist) it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the danger of removal is great, no *Mareva* injunction should be granted unless there is also a danger of default."

In *Rahman* v. *Abu Taha*[24], Lord Denning, M.R., at page 412, said:

"(An injunction may be granted against a resident of the United Kingdom) if the circumstances are such that there is a danger of his absconding, or a danger of his assets being removed out of the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied."

In *Z* v *A-Z*[5], Lord Denning, M.R. at page 571, said:

"The *Mareva* injunction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction."

Lord Justice Kerr, at pages 585-6, said:

"(It is an abuse to use the jurisdiction) in circumstances where there may be no real danger of the defendant dissipating his assets to make himself judgment-proof."

"(Relief should only be granted where) there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him ... The greatest value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring defendants into settlements."

Because in many case, there will be a practical difficulty of proving the requisite intent, I prefer the view that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the *effect* of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant. I am fortified in this view by the following short *dictum* in the judgment of Raja Azlan Shah C.J.(Malaya) *Zainal Abidin bin Haji Abdul Rahman* v. *Century Hotel Sdn. Bhd.*[9]:

"... In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim."

Encik Ghazi submitted, as regards this part of the case, that he was relying on the Defendants' impecuniosity, timing of the proposed sale, and the surrounding circumstances.

As regards the Defendants' impecuniosity, he invited me to consider, firstly, the history of the Defendant Company, in particular, its accounts which he submitted showed a continued loss: for example, in 1981, the loss was $10,818.000/– (p.12 of the Defendants' Annual Report for 1982 being, Exh: QJF 3, exhibited in the affidavit of Encik Quek Jin Fong, Secretary of the Defendants, affirmed to on October 13, 1983 (Encl: 132). In 1982, accumulated losses had risen to $61,511,000/- despite an increase in turnover. Total assets of the Defendant Company as at December 31, 1982 stood at $158,551,000/– (QJF3 p.12). In 1982, total assets of the Defendant Company fell to $109,124,000/–. He then went on to submit that although looking at the assets of the Defendant Company in isolation, there appeared to be no cause for concern, if one looked at its liabilities as reflected by its balance sheet we are left with $8,513,000/– which represents shareholders' funds. He then called attention to the item entitled "Contingencies" in the balance sheet, which, if they crystallized, would amount to $35,182,000/– to be paid out of shareholders' funds. It was submitted that the result of this would be a deficit of $26;669,000/– which, Encik Quek had agreed under cross-examination, "would not be a pretty picture."

Encik Ghazi then dealt with the twin questions of why the Defendants wish to effect the sale and what would happen to the proceeds thereof.

For clarity and a better understanding of this part of the case, it is necessary to reproduce the following paragraphs in the affidavit of Encik Quek (Encl: 132):

"20. I am advised by my solicitors and verily believe that there is no evidence as at the present time that the defendants are proposing to dispose of their assets with a view to defeating the plaintiffs' claim. They are merely rationalising their operations and reducing their indebtedness and it so happens that one of their major debtors is their parent company in Singapore and in the circumstances I am advised in law that the plaintiffs were misconceived in law in applying for the injunction.

22. The defendants like a vast number of other companies in Malaysia and worldwide have suffered from the recession which has caused them some financial problems. The defendants in September 1982 engaged a firm of professional management consultants of International standing to make an in-depth study of the defendants and suggest measures for general improvement of the defendants' operations. The consultants advised defendants that their 2 main landed assets were being under-utilized and that relocation should be considered.

25. ... the Defendants have not as a matter of deliberate policy attempted to dispose of the assets with a view to only repaying the parent company in Singapore and thereby defeat its creditors if any. The exercise is merely to reduce its indebtedness and ease its cash flow."

It is also necessary to reproduce paragraph 3 of Encik Quek's affidavit affirmed to on November 18, 1983 (Encl: 140), which reads:

"3. The Defendants on the sale of the property at Sungei Besi intend to utilize the major portion of the proceeds of sale in the following manner:

(a) to repay the long-term loans to the Bank and to United Engineers Ltd. in accordance with the repayment schedule;

(b) to repay certain other unsecured bank borrowings;

(c) to pay trade creditors, resident abroad and locally in accordance with the credit terms;

(c) to pay the costs of relocating the head office in Petaling Jaya.'

Encik Ghazi invited my attention to the company's paid-up capital which was $50 million, the capital reserve which was $20,024,000/– and the amount owing to United Engineers Limited (U.E. Ltd.), the Defendants' parent company,

which according to Encl: 140 is $94,661,000/– consisting of loans accumulated over a period of some twenty years.

Of the aforesaid sum of $94,661,000/–, $10,000,000/– was secured by debenture, a photostatic copy of which was exhibited. U.E. Ltd., incidentally, owns 44.4% of the equity in the Defendant Company.

Encik Ghazi accepted that the amounts shown in the balance sheet are owing by the Defendants to U.E. Ltd. He submitted, however, that a reasonable inference to be drawn from these facts was that the Defendants were facing serious financial problems. In fact, the Defendants were losing money and would, in all probability, continue to do so.

As to the other unsecured bank borrowings (para 3 (b) Encl: 140) and Trade Creditors (para 3 (c) Encl: 140) alleged by the Defendants, these, Encik Ghazi said, were bare allegations without specifying how much is going to be paid and to whom. He added that even the amounts were not stated nor names of the creditors given. The allegations were too general and amounted to saying "I owe somebody some money" and were clearly insufficient.

He questioned whether, assuming the sale were to go through, the proceeds of it would really go towards settlement of the above loans. He referred to the affidavits filed in support of the application to discharge the *ex parte* order made under s.19 of the *Debtors Act*. Nowhere in those affidavits was anything said to show that the Defendants intended applying the proceeds of the sale towards the repayment of the loans referred to in para 3 of Encl: 140. All that was there said (see affidavit of Encik Quek affirmed to on April 5, 1983 being Encl: 129) was that the proceeds of sale were to be applied to rationalise the Defendants' operations.

He also referred to certain newspaper reports, in particular, to the issue of *The Star* dated March 30, 1983 being, Exhibit JW4, annexed to affidavit of Encik James Wong affirmed to on April 22, 1983 being, Encl: 137, which referred to the Defendants as being a "loss ridden" company and another issue, also of *The Star* dated April 1, 1983 being, Exhibit MT 5, annexed to the affidavit of Michael Tan affirmed to on an unspecified date, being Encl: 129, which alleged that the Defendant Company in a major nationalization exercise was believed to be *"hiving off"* its prime properties for cash in an effort to reduce its hefty borrowings and pay off its creditors. These newspaper reports were undoubtedly admissible as the application before me is interlocutory, but I appreciated that they were in the nature of conclusions drawn by the author. Nevertheless, it was submitted that the allegations contained therein were serious and called for rebuttal by the Defendants and yet none was forthcoming. The explanation given by the Defendants now is that there was no need for them to make any reply because their duty was merely to shareholders and not to the public at large. But I should have thought that the Defendants would have been concerned to ensure that their commercial reputation was not tarnished by a failure to rebut such serious allegations. Moreover, the Defendants are a public company and members of the public are entitled to know the truth of its financial state. With respect, I find the explanation difficult to accept, and I do not accept it. Nevertheless, I do not place undue stress on this aspect of the case.

Encik Ghazi then cited *A & Anor.* v. *C & others. (No.2)*[25] and also criticized paragraph 3(d) of the affidavit of Encik Quek (Encl: 140) which alleged that part of the proceeds would be applied towards the cost of relocating the Defendants' head office. He asked, why even up to now, the Defendants had not disclosed the actual cost of this.

He further submitted that the natural thing for a company in the Defendants' position with acute financial and liquidity problems would be not to repay its colossal debts but to try and "rise from the ashes by rebuilding itself."

He then made the general submission that once the Plaintiffs had adduced *prima facie* evidence for the grant of a *Mareva* injunction, it was for the Defendants to neutralise or displace that *prima facie* case and this they had failed to do because they had not shown a *bona fide* intention to make the repayments listed in para 3(a) to (d) of Encl: 140.

In reply, Encik Abraham for the Defendants, submitted that the main thrust of paragraphs 14, 23 and 29 of the affidavit of Encik Tan, the Plaintiffs' managing director, affirmed to on an unspecified date (Encl: 129), was that the Defendant Company was conducting their business in

secrecy and that they are capable of disposing of their assets in secrecy. The Plaintiffs, he said, should know that this is impossible as they are themselves a publicly listed company and must know of the legal formalities which have to be complied with before they can dispose of their assets. He pointed out that notification to the Kuala Lumpur Stock Exchange (K.L.S.E.) was also necessary before a sale such as this could go through and quoted pages 47 – 48 in the K.L.S.E. Listing Manual. He then referred to Guideline 6 for the Registration And Acquisition of Assets, Mergers and Take-Overs issued by the Economic Planning Unit of the Prime Minister's Department which required Foreign Investment Committee (F.I.C.) and Capital Issues Committee (C.I.C.) approval, both requirements being referred to in the Draft Sale & Purchase Agreement annexed to Encl: 132. Not only that, there was also an Extra-ordinary General Meeting (E.G.M.) to be held in accordance with Article 53 when the matter of the Sale & Purchase Agreement would have to be debated and decided upon. Such an E.G.M. would be preceded by notices as required under that article. Specifically, the article provides as follows:

"The notices convening meetings shall specify the place, day and hour of the meeting and shall be given to all shareholders, at least fourteen days before the meeting. Any notice of meeting called to consider special business shall be accompanied by a statement regarding the effect of any proposed resolution in respect of such special businesses. At least fourteen days' notice of every such meeting shall be given by advertisement in the daily press and in writing to each Stock Exchange upon which the Company is listed."

For all these reasons, Encik Abraham submitted there could no question of a secret disposal of assets as alleged by the Plaintiffs.

Encik Abraham then submitted that an intent to defeat Plaintiffs' claims was an essential element for the grant of a *Mareva* injunction. In support he referred to *Zainal Abidin's case (supra)* p.264, 1st column, paragraphs F, D and to *Faith Panton Prop Plan* v. *Hodgetts & Anor.*[26] and also cited *Art Trend Ltd.* v. *Blue Dolphin (Pte) Ltd & Ors.*[27]

He submitted that in addition, the Plaintiffs must show that should they recover judgment there is a danger of default by the Defendants: *Third Chandris*[1].

On the affidavits before the Court, he submitted, it would not be reasonable to infer against the Defendants an intent to frustrate the Plaintiffs should they succeed in recovering judgment. He submitted that the Defendants were perfectly entitled to dispose of their assets to repay their legitimate debts wherever their creditors may be resident and referred to the judgment of Goff, J. in the *Angel Bell*[12]. He pointed out that there was no dispute that the debts in question were legitimate, *bona fide* debts.

On the question of the secured loan, namely, the debenture held by the parent company and in respect of which the amount owing as at April 30, 1983 was $7 million (para 16 Encl: 132), he referred to *Cretanor case*[28] where the Court of Appeal held that a debenture holder was entitled to apply for a discharge of the injunction to enable the removal of funds from the jurisdiction because the injunction did not operate as a pre-trial attachment of the assets it being merely a relief *in personam* and merely restrained the defendent personally from dealing with his assets in a particular way.

Encik Abraham then submitted that to make the order prayed for would amount to creating a fund for the Plaintiffs in violation of the *Cretanor case (supra)* and also cited *Yeng Hing Enterprise* v. *Liow Su Fah*[29]. He pointed out that there was no evidence that the Defendants had taken steps to make themselves judgment-proof. The asset proposed to be sold was only one of several pieces of land owned by the Defendants, these lands being particularised in paragraph 30 Encl: 132 and regarding which there was a report by Messrs: Jones, Lang & Wootton, Chartered Valuers, being Exhibit B. He stressed that to grant the order prayed for would result in the abuse which Justice Kerr envisaged in *Z.* v. *A-Z*[5]. He further argued that to grant the order prayed for would also paralyse the Defendants because the $16 million would have to be set aside. Few companies, however solvent, could set aside such a colossal sum. In fact, it would precipitate an insolvency. It would also amount to putting pressure on the Defendants to give security for the claim and thereby put the Plaintiffs in the position of secured creditors. This would be rewriting the law of insolvency and would contravene the principles enunciated by Goff, J. (as he then was) in the *Angel Bell,* p. 495, and by Kerr, J. in *A-Z – A-Z Ltd.* at p.306 F.

He next referred to the question of balance of convenience and said that if the order prayed for is granted, third parties, for example, U.E. Ltd. and other creditors, would be prejudiced. He pointed

out that the sort of material from which a Court could infer a danger of default was set out by Lawton, L.J. at p.671 para G to 672 C, in the *Third Chandris case (supra)*, and submitted that in this case there was no evidence meeting those requirements. He further submitted that one of the main points made by the Plaintiffs was that there is no way they could find out what was happening to the Defendants' assets and even if they could they may be too late. In reply, he said that the Defendants could not dispose of their assets secretly because of the various legal formalities he had already adverted to. In any case, he submitted that the case of *Bekhor* v. *Bilton*[16] shows that there is power to order discovery to facilitate obtaining *Mareva* injunctions.

Turning to Encik Ghazi's submission regarding the Defendants' accounts, Encik Abraham castigated this as selective reading of the accounts. He said that while it was true that the "Contingencies" referred to at p.22 of the Defendants' Annual Report for 1982 were not taken into account this was quite usual. He then referred to p.22 para 21 (a)(i)(ii) of this Report which reads:

	Group $000's		Company $000's	
	1982	1981	1982	1981
Guarantees given to bankers in respect of bank facilities granted to:–				
subsidiary companies	–	–	7,291	1,507
associated companies	199	200	199	200
Guarantees given on behalf of customers	15,999	21,885	15,999	21,885

These, he submitted, were only a secondary liability undertaken by the Defendants and the same was true as regards paragraph (a) (iii), which reads:

	Group $000's		Company $000's	
	1982	1981	1982	1981
Recourse to the Company by finance houses in respect of their lease and hire purchase arrangements with the Company's customers	11,693	1,299	11,693	14,299

He then referred to page 23 paragraph (b) of the Report, which reads:

> "As at 31st December 1980, litigation was pending against the Company in respect of a claim for specified damages of approximately $16,000,000 and unspecified and unquantifiable damages relating to a project completed in previous years. In 1981, further unrelated situations of lesser magnitude came to light which once again were associated with projects completed in previous years.
>
> The Company is dealing with these situations but at this time it is not possible to determine their eventual outcome. The balance of the unutilised provision for losses that may arise amounts to $6,333,000 at 31st December 1982 and this is included under other creditors in the balance Sheet."

It was true, he submitted, that the Plaintiffs were claiming $16,000,000 by way of damages from the Defendants but the question is: what will they recover, assuming they succeed in establishing liability?

As regards the "Contingencies" referred to in the Defendants' Balance Sheet which if they crystallized would amount to $35,182,000/–, these, he said, would not crystallize at the same time.

He further submitted that it would be wrong to assume that the entire proceeds of sale would be used to repay U.E. Ltd. In answer to the Court, he said only part of it would be utilized to pay U.E. Ltd., mainly moneys relating to the amount secured by debenture, part of it to pay bank loans which are unsecured, and part of it to relocate the head office from Sungei Besi to Petaling Jaya: (see para 3 Encl: 140).

I now propose to analyse the main points in the submission made by counsel for the Plaintiffs and the Defendants and to give my conclusions thereon.

At first sight, it would appear that Encik Ghazi's case was put, not on the basis that Defendants were intending to remove the proceeds of sale out of the jurisdiction or to dissipate them within the jurisdiction with the intention of defeating the Plaintiffs' claims, but on the basis that the Defendants had suffered, are suffering and would continue to suffer financial adversity in business and were generally impecunious so that they were not a company to be relied upon. This latter ground is as legitimate as the former for, as Mustill, J. said in the *Ninemia Maritime Corporatio case*, "... or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not one to be relied upon ...". Reflection however reveals that by questioning the *bona fides* of the

Defendants' intention to pay out of the proceeds of sale the debts already referred to, he was in fact implying that the contemplated sale was with the intention of defeating the Plaintiffs' claim and I shall therefore assume that his submission is two-pronged.

I think Encik Ghazi was right when he submitted that in the first place the onus was on the Plaintiffs to establish a *prima facie* case for the grant of a *Mareva* injunction and if the Court was so satisfied it had to consider the evidence adduced by the Defendants to see if this *prima facie* case had been neutralized or displaced.

I have no hesitation in holding, on the present state of the authorities, that the mere disposal of funds (in this case proposed to be raised by the sale of the Sungei Besi property) incidental to the Defendants' course of business, for example, by the repayment of debts, does not come within the scope of dissipation of assets with the intention or with the effect of defeating the Plaintiffs' claim. As Lush, J. said in *J.D. Barry Pty. Ltd.* v. *M. & E. Constructions Pty. Ltd.*[30]

"If an injunction could be obtained in the present case it would either be entirely ineffective to benefit the plaintiff, because the money would stand held for the benefit of creditors generally, or the result would be that a plaintiff could require a defendant to set up a special fund to meet a debt not yet proved, or again, the effect might be to give the particular plaintiff preference over other business creditors."

In the circumstances, an important question of fact which calls for determination is whether the Defendants will, as their Secretary alleges, apply the proceeds of sale of the Sungei Besi property towards satisfaction of their loans, legitimate trade debts and for meeting the cost of relocating their head office and workshop.

It is clear that had an *ex parte Mareva* Injunction been granted, and had the Defendants applied to vary or qualify the Order, they would have had the burden of satisfying the Court that there is a good reason for the Order to be varied or qualified. "I do not consider," said Goff, J. in *A. & Anor.* v. *C. & Ors. (No.2)*[25] "that in normal circumstances a defendant can discharge that burden by simply saying 'I owe somebody some money'." In my opinion, the same principle should apply, where, as here, the application is made, *inter partes*, and the Defendants resist it on the ground that they wish to apply the proceeds of the intended sale in relation to their course of business. Applying that test, I do not consider that the Defendants have discharged the burden which lies upon them and shall presently give my reasons for this conclusion.

As regards the loans owing to their parent company, the Defendants have put in a letter dated April 5, 1983 from the parent company, addressed to them, being Exhibit A, which states:

"The Directors
United Engineers (Malaysia) Berhad
2 Jalan Sungei Besi
Kuala Lumpur
West Malaysia

Our Ref: CYH/CFY/pk
Date: 5 August 1983

Dear Sirs

ACCOUNTS TO 31st DECEMBER 1982

At your request we confirm that the United Engineers Limited Group will continue to support United Engineers (Malaysia) Berhad by:

(i) not demanding payment or repayment of monies due in the foreseeable future, except to the extent that funds for that purpose are available to your Group;

(ii) subject to any future agreement which may be made between the two companies, not withdrawing any guarantees which may have been made on your behalf by members of the United Engineers Limited Group.

Yours faithfully
UNITED ENGINEERS LIMITED

(Sgd.) CHUA YONG HAI
MANAGING DIRECTOR."

Amongst those loans is one for $7 million secured by debenture, to which I have already referred. I am aware that a debenture holder is entitled to apply for a discharge or variation of the injunction to enable the removal of funds from the jurisdiction: *Creatnor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.*[28] but there is no such application before me. All we have is a letter "A" which far from asking for repayment is really an implied promise, made voluntarily, to forbear from pressing for repayment. I might, in passing, mention that, considering the paid-up capital of the Defendant Company is only $50 million and the parent company owns only 44.4% of its equity, the loans, very substantially unsecured, owing by the former to the latter, amounting to $94,661,000 are indeed monstrous and thought-provoking.

As to the other loans owing by the Defendants,

itemised in paragraph 3(a) of Encik Quek's affidavit of November 18, 1983 being, Encl: 140, I propose to deal with them *seriatim*.

As to the long-term loan owing to the bank, we do not know which bank is concerned. It is true that the loan is included in the Balance Sheet of the Defendants for the year 1982 but surely a Court is entitled to expect proof of a demand for repayment. In passing, I note that the repayment schedules referred to in paragraph 3 (a) of Encik Quek's affidavit (Encl: 140) have also not been exhibited.

As to "certain other bank borrowings" referred to in paragraph 3(b) of Encl: 140, no particulars have been given. We do not even know the amounts owing, which banks are concerned or the terms of those loans. Again, there is no proof of a demand for repayment.

The same criticisms would apply to paragraph 3(c) of Encl: 130 which speaks of "Trade creditors resident abroad and locally in accordance with the credit terms."

The cost of relocating the head office referred to in paragraph 3 (d) Encl: 140 is not stated although I should have thought there would be no difficulty about specifying this seeing that the Defendants have had all the time in the world to do so.

I think there is substance in Encik Ghazi's complaint that the omission on the part of the Defendants to mention any of the items (a) to (d) of paragraph 3 of Encl: 140 in the affidavits filed in support of their Summons-in-Chambers for the discharge of the *ex parte* order I had earlier made under s.19 of the Debtors Act, 1957, makes one suspicious of the *bona fides* of the Defendants' present professed intention to apply the proceeds of the proposed sale for the purposes they claim.

There is also the conspicuous omission to put in the Report of the firm of professional management consultants of international standing who it is alleged by Encik Quek in Encl: 132 had advised that the Petaling Jaya and Sungei Besi properties were being under-utilized and that relocation should be considered. It is noteworthy that they do not appear to have recommended any sale.

My first thoughts were that I had grave doubts as to the Defendants' solvency and had the Sungei Besi property been the only or substantially speaking the only property owned by the Defendants I would have had no hesitation in granting the *Mareva* injunction restraining its sale, which, incidentally, is the primary relief prayed for in the instant application. I pause to say that I have not overlooked the fact that at the time when I made the *ex parte* order under s.19 of the *Debtors Act* the Defendants had intended to sell not merely the Sungei Besi property but the Petaling Jaya property as well which, according to Encik Quek, constitutes the Defendants' "two main landed assets" (see para 22 of Encl: 132). In this context, it is relevant to note that it was alleged by the Plaintiffs' Managing Director, Encik Michael Tan, in para 13 of his affidavit affirmed to on March 19, 1983 being, Encl: 121, and not challenged or contradicted by the Defendants "that the Sungei Besi land and the Petaling Jaya land are the Defendants' main operational base and also the base for most or all of their eight subsidiaries and associate companies. On the Sungei Besi land are situate its head office, workshops with heavy plant and equipment and stores for the Defendants' engineering, trading and construction business. Petaling Jaya land is the Defendants' base for civil engineering division and also sales of engineering equipment and other goods..." (see para 13 of Encl: 121).

I recognize that at the base of the *Mareva* jurisdiction is the principle that disposal of assets would result in the fruits of the judgment in favour of the plaintiff being uncollectable.

It is therefore relevant to probe the issue of resources further and to consider what proportion of the Defendants' financial worth is represented by the asset or assets intended to be sold or which is or are being sold.

The only evidence of assets other than that intended to be sold or being sold (the other assets) and their worth appears in the affidavit of Encik Quek affirmed to on October 24, 1983 (Encl: 135) annexed to which is an unauthenticated, unsigned and undated photostatic copy of an extract from a report alleged to be prepared by Messrs: Jones, Lang & Wootton dated January 5, 1982 not made for purposes of these proceedings. Later, during the argument, a copy of that Report, being Exhibit B, was tendered in evidence. I do not regard this as satisfactory evidence of present ownership of the properties concerned let alone of their value. No authenticated abstract

of title or even a photostatic copy of any title was annexed.

It is true that Encik Quek has asserted that the Defendants owned the lands listed in the extract aforesaid. But he was appointed Secretary of the Defendant Company only with effect from January 10, 1983 and could not possibly have any personal knowledge of this assertion. His statement must therefore be based on information and belief, and indeed, in paragraph 1 of his affidavit (Encl: 135) he has said, *inter alia,* "that the facts deposed to are within my knowledge or. alternatively acquired from records to which I have access." So the question arises: what are the records upon which he bases his assertion as to ownership? Are they the Defendants' records, and, if so, what do they consist of? Is it the report of Messrs: Jones, Lang & Wootton dated January 5, 1982 Exhibit B? If so, I regard this as being of negligible value because, on the issue of ownership, it would be hearsay at least twice removed and the extract from it would, of course, be even more infirm. In any event, even if the report, Exhibit B, and the extract therefrom were treated as acceptable evidence of ownership, they relate to a date two years antecedent in relation to the present proceedings and are, therefore, of no assistance to the Defendants.

Perhaps Encik Quek relied on some other record and, if so, this Court is entitled to know what that record is and, in the absence of disclosure, that part of the affidavit is inadmissible: *Re Young (J.L.) Manufacturing Co.*[31]

In this context, it is pertinent to note that at first Encik Quek merely asserted that the Plaintiffs are incorrect in saying that if the Sungei Besi and Petaling Jaya properties are sold the Defendants will have no substantial assets to satisfy the Plaintiffs' judgment, if any, for the Defendants have the following landed properties and other assets, particulars of which are as follows:

(i)	*Landed Properties* *Location*	*Value* (1982)
(a)	Ipoh	$4 million
(b)	Sandakan	$1.5 million
(c)	Kota Kinabalu	$1 million
(d)	Miri	$1.2 million
(e)	Kuching	$1 million
(II)	Stock in Trade and Work in Progress	$72 million
(III)	Debtors	$50 million
(IV)	Other Fixed Assets	$2.5 million

However, it was only after I specifically asked counsel to give particulars of the landed properties and other assets including their values were the Report Exhibit B and the extract concerned tendered in evidence. No particulars were however given of the other assets, that is to say, the Stock in Trade and Work in Progress, Debtors or Other Fixed Assets. As Denning, M.R. said in *Z. Ltd.* v. *A-Z etc.*[5]:

> "If he (defendant) comes on the return day and says that he has ample assets to meet the claim he ought to specify them. Otherwise his refusal to disclose them would go to show that he is really evading payment."

In any event, on such an important aspect of the case, the Court is entitled to expect far more satisfactory evidence. On evidence as to ownership of lands, there should be, for example, a certified copy of an abstract of title or a certified photostatic copy of the issue document of title or an affidavit of result of search at the Land Registry. On evidence as to value of a company's property, there should be expert evidence containing not merely conclusions but also reasons for them and this could take the form of a *recent* signed report or, better still, an affidavit affirmed by the expert (see the precedent at Form 30 p.148 of *Atkin's Court Forms* Vol. 9 1982 Issue, 2nd Ed.).

I might add that there is authority for saying that the Court may refuse to admit an affidavit based on information and belief where better evidence is readily available: *Wiley, Lowe & Co.* v. *Gould*[32].

To sum up this part of the case, I hold that there is no admissible evidence or, alternatively, satisfactory evidence before me, that apart from the Sungei Besi and Petaling Jaya properties the Defendants own any other landed properties as at the present time, nor for that matter is there satisfactory evidence before me proving that the Defendants own any other assets as alleged by Encik Quek. Alternatively, if I am wrong in this, and the Report of Messrs: Jones, Lang & Wootton, being Exhibit B, and the extract therefrom are admissible, and constitute sufficient proof as to the ownership of landed properties at the present time, I am satisfied that the Sungei Besi property and the Petaling Jaya property do in fact constitute a substantial part of the Defendants' landed assets and that the Plaintiffs have established a

likelihood that unless restrained by Order of this Court the Defendants will sell these properties. I do not regard the aborted sale of the Petaling Jaya property (for which incidentally no reasons were vouchsafed to this Court) as in any way detracting from this conclusion because it is clear evidence of the Defendants' intention to dispose of the same.

As regards Stock-in-Trade and Work in Progress for which $72 million was claimed there was no apportionment as to how much constituted Stock-in-Trade and how much Work in Progress. However, Encik Quek himself admitted in cross-examination that the sum claimed in respect of Stock-in-Trade did not allow for obsolescence and write-off for slow moving stock.

As regards the $50 million claimed for Debtors, Encik Quek admitted that this included doubtful debts without saying what part this represented.

As for "Other Fixed Assets" Encik Quek said this related to Plant and Machinery and was only his "rough estimate".

In the circumstances, the bare assertions of Encik Quek as to the value of Stock-in-Trade and Works in Progress, Debtors and Other Fixed Assets claimed to amount to $124.5 million I would regard as totally inadequate as they have not been substantiated properly or at all.

I think I should, at this stage, make a general observation regarding the impression Encik Quek made upon me as a witness whilst under cross-examination. Quite frankly, his oral testimony did not inspire confidence especially, on matters relating to the Defendants' accounts, solvency and resources. In a number of instances, he did not seem sure as to what he was saying. This, I thought, was especially surprising since he is an Accountant, albeit not a Chartered Accountant.

There was, incidentally, no request by the Defendants for leave to cross-examine any of the deponents on whose affidavits the Plaintiffs relied.

It is also worth mentioning that dealings in shares of the Defendant Company on the Kuala Lumpur Stock Exchange have been suspended and apart from the present suit there are two other claims pending against Defendants for the recovery of substantial sums of money arising out of two other projects undertaken by them, one involving the City Bank Building, Penang, and the other at Desa Kuda Lari, Kuala Lumpur. The former is the subject of an action being, Penang High Court Civil Suti No. 288/83.

Finally, I might add that as recently as December 24, 1983 the Star newspaper reported at page 41 of its issue of that date in an article entitled "U.E.M. Confirms Sale of Sungei Besi Property" that the Defendants signed the conditional sale and purchase agreement to sell the Sungei Besi property to Malayan Breweries for $18.1 million cash. I verified the accuracy of this report by asking the Senior Assistant Registrar to make the necessary enquiries from Encik Abraham and she reported in the affirmative adding that a deposit towards the purchase price was now with the solicitors for the vendors. I then asked for an undertaking from Encik Abraham that his firm who were the solicitors concerned would not part with the deposit or indeed the purchase price until the final determination of this application. This has now been duly furnished.

Prima facie such conduct in hurrying along with the sale, knowing that judgment in an application to halt that very sale is still pending, would appear to be a material factor for me to take into account since the *Mareva* injunction is a species of equitable relief where general equitable considerations apply. However, since I am not aware as to the reasons which prompted such a course of action and, as the agreement for sale and purchase is subject to various approvals being obtained, I shall refrain from drawing any adverse inference against the Defendants on this score.

I might add that my attention was drawn to the recent unreported judgment in *Penang Garden Sdn. Bhd. & Anor.* v. *United Engineers (M) Berhad.*[33] I regret that I do not consider it to be of any assistance as the evidence relied upon by the Defendants was accepted at its full face value and, as a result, none of the infirmities therein, to which I have referred, were probed sufficiently, or at all.

In the circumstances, I decline to make a *Mareva* Order in terms of the primary relief sought, so that the Defendants are at liberty to proceed with the sale of the Sungei Besi property but, on the usual undertaking as to damages by the Plaintiffs, reinforced by a further undertaking of a like nature by the Plaintiffs' parent company, namely, M.B.F. Holdings Berhad, the sufficiency of whose

undertaking the Defendants do not contest, I make an Order that the Defendants be restrained pending trial of the action by itself, its servants or agents, from disposing of or dealing with any part of the net proceeds of sale of the Sungei Besi property insofar as the same do not exceed $16,823,443/– otherwise than by or pursuant to an Order of Court. This does not mean that these proceeds will necessarily remain sterilized for the benefit of the Plaintiffs for the Court can permit the Defendants to use them for paying *bona fide* debts as they fall due and upon sufficient proof of an intention to do so: see *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A. (supra)* and provided always the Defendants are able to rebut the inference of a real risk of default (the *Third Chandris (supra)* per Denning, M.R. at p.672) which I have drawn from the evidence now before me.

It follows, therefore, that it would be open to any creditor of the Defendants, and indeed to the Defendants themselves, to apply for a variation of this Order if they so wish.

In the result, I uphold both prongs of the Plaintiffs' submissions aforesaid and order that the costs of this application be paid by the Defendants to the Plaintiffs.

Order accordingly.

Solicitors: *Presgrave & Matthews; Shearn, Delamore & Co.*

IN RE DIVORCE PETITIONS NOS. 18, 20 and 24 of 1983

[O.C.J. (Shankar J.) February 23, 1984]
[Johore Bahru Divorce Petitions Nos. 18, 20 & 24 of 1983]

Family Law – Divorce – Mutual Consent – Requirements for exercise of jurisdiction by the Court – Divorce and Matrimonial Rules, 1980, r. 32 and 33 and Form 3 – Law Reform (Marriage and Divorce) Act, 1976, ss. 47, 52, 53 & 54.

Family Law – Divorce – Scope of section 52 of Law Reform (Marriage and Divorce) Act 1976 – Irretrievable breakdown of marriage still sole ground for divorce – Application of judicial discretion.

In this case joint petitions for divorce came up for disposal. The petitions followed Form 3 as prescribed by the Divorce and Matrimonial Rules, 1980. The question of law which arose was where a joint petition for dissolution of marriage is presented under section 52 of the Law Reform (Marriage and Divorce) Act, 1976 is the mere mutual consent of the petitioners to the dissolution the sole criterion for the grant of the decree nisi.

Held: (1) irretrievable breakdown of marriage is still the sole ground for divorce under the Law Reform (Marriage and Divorce) Act, 1976. Mutual consent by the spouses to a decree of dissolution does not of itself entitle them to a divorce. Such a mutual consent cannot of itself oust the jurisdiction of the courts to enquire into, if it thinks fit, and decide whether in all the circumstances it is just and reasonable that the decree should be made;

(2) Form 3 of the Divorce and Matrimonial Rules is not a magic formula which by a mere repetition of its terms entitles the parties without more (except the signature of their counsel) to a dissolution. To comply with section 57(1)(d) and (2) of the Act it would suffice if a statement is made in the joint petition to the effect that the marriage has irretrievably broken down and that both parties mutually agree that the marriage should be dissolved. A statement is also required in the petition as to the steps taken to effect a reconciliation;

(3) it is desirable that the contents of the joint petition should be the subject of an affidavit in support by the petitioners.

Cases referred to:

(1) *Sim Kim Ong* v. *Goh Phaik Sooi* [1976] 1 M.L.J. 232.

(2) *Santos* v. *Santos* [1972] 2 All E.R. 246; [1972] Fam. 247.

DIVORCE PETITIONS.

Teh Poh Teik for the first petitioner in Petition No. 18.

K.R. Muthu for the second petitioner in Petition No. 18.

Gary Yuen for both petitioners in Petition No. 20.

Karam Singh for both petitioners in Petition No. 24.

Cur. Adv. Vult.

Shankar J.: On January 9, 1984 numerous joint petitions for divorce came up for disposal in this court. They faithfully followed Form 3 as prescribed by the Divorce and Matrimonial Rules 1980 (the Rules) and invoked the jurisdiction of this court under section 52 of the Law Reform (Marriage and Divorce) Act 1976 (the Act).